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In the Supreme Court of the United States

OCTOBER TERM, 1939.

No. 888. 44

No. 889. 45

CHARLES PEYTON WEST, et al.,

Petitioners,

vs.

**THE AMERICAN TELEPHONE AND TELEGRAPH
COMPANY,**

Respondent.

**BRIEF OF RESPONDENT IN OPPOSITION
TO PETITION FOR CERTIORARI.**

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SUPPLEMENTARY STATEMENT OF THE CASE.

This action is one brought by petitioners in equity to secure redress for an alleged wrongful transfer of the stock in the respondent telephone company. The stock in question had been left by the will of petitioners' father to petitioners' step-mother for life, remainder to the petitioners. The petitioners' theory was that the respondent in 1927 was negligent in issuing stock certificates to petitioners' step-mother without limitation, as a result of which petitioners' step-mother in 1929, by deliberate wrong, sold the stock. (R. 2-3.)

The present action* followed a former suit on the same cause of action in the Ohio courts, begun in 1934.

* Begun July 14, 1937, in the United States District Court for the Northern District of Ohio, Eastern Division. (R. 2.)

The latter case was carried to the Court of Appeals of Cuyahoga County, Ohio, which rendered "final judgment" for respondent. (R. 114.) The judgment of the state Court of Appeals was unqualified but its opinion, referred to in its mandate but not filed (R. 113), gave as the *reason* for the decision that until demand was made no cause of action accrued to petitioners. The Supreme Court denied without opinion a motion to certify, similar to a petition for certiorari in this Court. (54 O. App. XLIII.)

The petitioners in their petition (pages 2 and 3) state five principal questions which, they claim, are presented by this case. We must supplement their statement of the second question (Pet. 3) by pointing out that there are two questions of *res judicata* involved: (a) whether the unfiled *opinion* of the state Court of Appeals is *res judicata*, as the petitioners claim, and (b) whether the *judgment* of the state Court of Appeals is *res judicata*, as the respondent contends.

Another question, not stated by petitioners, is the proper interpretation of Section 11224 of the General Code of Ohio, the statute of limitations.

Finally, and most important, is the question whether the respondent was negligent in issuing the certificates to petitioners' step-mother, particularly in view of the fact that both petitioners joined in the application for distribution to the step-mother. (R. 66, 67.)

Thus there are at least three issues in addition to the five noted by the petitioners.

A R G U M E N T.

I. No federal question is appropriately raised for decision by this Court.

The present controversy is one of only private interest to the litigants, involving the alleged negligent issuance of stock certificates. It has thus far been in litigation for almost six years and involves an alleged wrong which took place more than thirteen years ago. The case has been before five courts thus far; the Common Pleas Court of Cuyahoga County, Ohio; the Court of Appeals of Cuyahoga County, Ohio; the Supreme Court of Ohio (on motion to certify, not on the merits); the United States District Court for the Northern District of Ohio and the Circuit Court of Appeals for the Sixth Circuit. Both state and federal appellate courts decided in favor of the respondent and the Ohio Supreme Court refused to entertain an appeal. The two *nisi prius* courts decided in favor of the petitioners. Plainly this case, considering that it involves purely private law, has had all the judicial consideration it deserves.

Of the numerous questions raised in the case, only one suggests a question of federal law. The issues of *res judicata*, the issues with respect to the statute of limitations and laches, the issue as to whether the action sounds in tort or contract, and the question of acceleration of remainders are all questions of general jurisprudence and involve no novel legal points.

There is thus only one question which, even on the presentation made in the petitioners' brief, might present an appropriate matter for consideration by this Court. That is the question whether the federal courts are bound, under *Erie Railroad v. Tompkins*, 304 U. S. 64 (1938), to follow an unfiled opinion of the Court of Appeals of Cuyahoga County, Ohio, on the question whether demand was a necessary preliminary to suit by the petitioners.

Even this question is not so raised in the case that this Court would be called upon to decide it, if certiorari were

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granted. In the first place the ruling upon the point was an alternative holding. The decision in favor of the respondent was based equally upon the Circuit Court of Appeals' conclusion that the petitioners were guilty of laches in making their demand and prosecuting their claim.* (R. 142.) Judge Simons concurred in the result only on the latter ground.** (R. 143.) Consequently, this Court would not be called upon to rule upon the matter of applying *Erie Railroad v. Tompkins* unless it reversed the finding of all three Judges of the Circuit Court of Appeals that the petitioners were barred by laches.

There are six other issues in the case, some not decided by the Circuit Court of Appeals, on five† of which this Court will be required to find in favor of the petitioners before a reversal of the Circuit Court of Appeals will be necessary or permissible.

* The opinion of Judge Allen holds that the respondent was at fault in issuing the certificates but that (1) the action is barred by the statute of limitations because (a) by the best rule demand is not a prerequisite to suit, (b) the decision of the Ohio Court of Appeals to the contrary is not binding, and (c) the four year statute of limitations applies and there is no saving clause applicable; and (2) recovery is *also* barred by the petitioners' laches in making demand and prosecuting their claim.

** Possibly he failed to concur in the ruling on the applicability of the *Tompkins* case because petitioners had not argued the point, having relied only on the effect of the Ohio Court of Appeals' opinion as *res judicata*.

† One of the issues stated in the petition (p. 3), that of acceleration of the remainder, was raised by the petitioners' appeal to the Circuit Court of Appeals. If this Court should find against the respondent on all the other points, a finding in favor of the petitioners on this point would not be necessary to permit a reversal.

II. There is no necessity for this Court to decide whether under *Erie Railroad v. Tompkins* a decision of the Ohio Court of Appeals is binding upon the federal courts.

It is not necessary for this Court to determine whether decisions of lower state courts are binding upon the federal courts because it is already clear from the decisions of this Court, both before and after the decision in *Erie Railroad v. Tompkins*, that only the decision of the highest state court is binding. In *Graham v. White-Phillips Co., Inc.*, 296 U. S. 27 (1935), it was held that a decision of the Court of Appeals of Illinois (an intermediate appellate court) construing the Illinois negotiable instruments law was not binding on federal courts. The decision in *Erie Railroad v. Tompkins* itself specifically refers to the "highest court" of a state as being, together with the state legislature, the authority which the federal courts must follow. (304 U. S. 64 at 78.) Similar references to the highest court of the state appear in *Lyons v. Mutual Benefit Association*, 305 U. S. 484 at 489 (1939), and *Wichita Royalty Company v. City National Bank*, 306 U. S. 103 at 107 (1939).

The decision in *Ruhlin v. New York Life Insurance Company*, 304 U. S. 202 (1938), cited by petitioners (Br. 11), is no ruling to the contrary. It merely remanded the case to the District Court for determination of what the state rule on the question was, without stating whether state lower court cases should be followed.

The decision in *Blair v. Commissioner*, 300 U. S. 5 (1937) (Pet. Br. 11), was a tax case in which it was held that the decision of the Illinois Court of Appeals construing certain assignments was binding upon the federal court in determining the effect for purposes of taxation of the same instruments. The point there involved was in the nature of *res judicata* (see 300 U. S. at 10) and the decision cannot be deemed to have overruled the square holding of this Court in *Graham v. White-Phillips Co., Inc.*, *supra*, with respect to the effect of decisions of the Illinois

Court of Appeals. The case of *Erie Railroad v. Hilt*, 247 U. S. 97 (1918) (Pet. Br. 11), involved, we submit, only the *persuasive power* of a decision of the New Jersey Supreme Court.

The cases in the Circuit Courts of Appeals are too numerous to discuss, but we may observe that since the decision in *Erie Railroad v. Tompkins* there has been no real conflict with the decision in the instant case. *Hack v. American Surety Company*, 96 Fed. (2nd) 939 (C. C. A. 7, 1938) (Pet. Br. 11), is no more than an intimation to the contrary. Where, as there, state court decisions are in fact followed, it is difficult to determine whether persuasive or binding effect is accorded to them.

The case of *Field v. Fidelity Union Trust Company*, 108 Fed. (2nd) 521, decided by the Circuit Court of Appeals for the Third Circuit at about the same time as this case, is in accord with it and contains an exhaustive review of the cases. Decisions by other courts squarely raising the question of the binding effect of decisions of lower state courts will undoubtedly be frequent, and this Court will have ample opportunity to settle the question in an appropriate case if it should feel the need to do so.

One more observation has importance, we submit, upon the consideration of this petition. Unless *no* inferior state court can bind the federal courts (on which hypothesis this case was rightly decided) considerable discrimination must be exercised in determining *which* inferior state courts can bind the federal courts. The exercise of this discrimination requires thorough study of the structure of the particular state judicial system. Circuit Judge Allen, who wrote the opinion in the Circuit Court of Appeals in this case, was formerly a judge of the Supreme Court of Ohio and has stated in the opinion cogent reasons of state court practice for her decision, the principal one being that the decision of the Court of Appeals for one county does not make state law. (R. 140.) We submit that this case has

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correctly decided the question for the State of Ohio, even though in some other states the decisions of intermediate appellate courts might be binding upon the federal courts. In this aspect the case is one of largely local concern and no review is necessary.

CONCLUSION.

The questions presented in this case are not of public interest, nor do they present any legal novelty. The sole question of federal law was only an alternative holding and the only point upon which the Circuit Court of Appeals was unanimous was that petitioners were guilty of laches. The binding effect of decisions of lower state courts has been the subject of many decisions, including those of this Court, and the proper rule is clear.

The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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